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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

VLAD TSYN, DANIEL SILBERMANN,
LORI BAGWELL, and CATHERINE
HORAN WALKER, individually and on
behalf of all others similarly situated,

Plaintiffs,

VS.

WELLS FARGO ADVISORS, LLC,

Defendant.

Case No. 14-cv-02552-LB

**DEFENDANT WELLS FARGO
ADVISORS, LLC'S NOTICE OF
MOTION AND MOTION FOR PARTIAL
SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: January 28, 2016

Time: 9:30 a.m.

Courtroom: C –15th Floor

Judge: Hon. Laurel Beeler

1 **NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGEMENT**

2 TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

3 **PLEASE TAKE NOTICE** that on January 28, 2016 at 9:30 A.M. or as soon thereafter as
4 the matter may be heard, in Courtroom C, 15th Floor, of the Honorable Laurel Beeler of the
5 United States District Court, Northern District of California, 450 Golden Gate Avenue, San
6 Francisco, California 94102, Defendant Wells Fargo Advisors, LLC (“Defendant” or “WFA”),
7 will and hereby does move the Court for partial summary judgment pursuant to Rule 56 of the
8 Federal Rules of Civil Procedure, dismissing Plaintiff Vlad Tsyn’s individual Second Cause of
9 Action contained in the Third Amended Complaint alleging violations of 29 U.S.C. § 201 *et seq.*
10 WFA brings this motion on the grounds that there is no genuine dispute as to any material fact
11 Plaintiff Tsyn qualified for the administrative exemption during his tenure with WFA.
12 Specifically, Plaintiff’s own deposition testimony confirms that his duties qualified him for the
13 exemption.

14 This motion is based on this Notice of Motion and Motion, the attached Memorandum of
15 Points and Authorities, the concurrently filed declaration of Malcolm Heinicke and the exhibits
16 thereto, the pleadings and records on file in this action, and on any additional evidence and
17 arguments that may be presented before or at the hearing of this motion. The Court has set a
18 stipulated briefing schedule for this motion. *See* ECF No. 52.

19

20 DATED: November 19, 2015

MUNGER, TOLLES & OLSON LLP

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22

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By: */s/ Malcolm A. Heinicke*

24 MALCOLM A. HEINICKE

25 Attorneys for Defendant WELLS FARGO ADVISORS,
26 LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Vlad Tsyn worked as a Series 7 licensed Financial Advisor (a stock broker) with Defendant Wells Fargo Advisors, LLC (“Wells Fargo” or “WFA”), where, consistent with decades of regulatory guidance and industry practice, he was classified as an exempt “white collar” employee under the federal Fair Labor Standards Act (“FLSA”). Because Plaintiff Tsyn has admitted that he performed the very tasks that the pertinent regulations and guidance have deemed exempt, WFA is entitled to summary judgment on his individual misclassification claim.

9 Since the 1940s, Department of Labor (“DOL”) regulations have provided that the
10 administrative exemption covers licensed Financial Advisors (“FAs”) who perform the common
11 FA advisory tasks required by securities laws. *See* 29 C.F.R. § 541.205(c)(5) (1949); 29 C.F.R. §
12 541.207(d)(2) (1949). In 2004, the DOL stated that “many financial services employees” satisfy
13 the exemption and issued clarifying regulations stating that such employees “generally meet the
14 duties requirements for the administrative exemption” if their tasks “include”:

15 collecting and analyzing information regarding the customer's income, assets,
16 investments or debts; determining which financial products best meet the
17 customer's needs and financial circumstances; advising the customer regarding
18 the advantages and disadvantages of different financial products; and marketing,
servicing or promoting the employer's financial products. However, an employee
whose primary duty is selling financial products does not qualify for the
administrative exemption.

19 29 C.F.R. § 541.203(b); 69 Fed. Reg. 22,122, 22,146 (Apr. 23, 2004). The DOL's decision to
20 specify these duties as exempt was telling because pertinent FINRA rules require Series 7 licensed
21 FAs like Plaintiff to gather financial information on each client and then provide suitable
22 investment advice on the basis of this profiling process. *See* FINRA Rules 2090 & 2111.

23 There is no factual dispute that Plaintiff Tsyn performed the very tasks the DOL has
24 deemed exempt. Plaintiff has testified that his “primary role” was to “design and maintain
25 comprehensive wealth plans to address estate, retirement income, and business succession needs.”

1 Heinicke Decl. ¶ 1, Ex. A (Tsyn Deposition Transcript)¹ at 100:7-9, 100:23-102:1, 103:20-24; *id.*
 2 at Dep. Ex. 4 (resume)). Plaintiff has conceded that:

- 3 • When working with a client, he would gather and consider information on each
 4 client’s “entire financial picture,” including “income,” “assets,” “other investments”
 5 and “debts,” and that the duty to understand this information was ongoing. (Tsyn
 6 Dep. at 42:23-44:14, 41:1-9);
 7
- 6 • His “task” as an FA was to “understand [his] client,” and “match an appropriate
 7 investment product to their specific needs.” (*Id.* at 42:14-17);
 8
- 7 • In the process of doing this, he would give each “client advice in the form of
 8 recommendations,” and, when doing so, one of his obligations “was to advise the
 9 client on the potential advantages and disadvantages of each of [his]
 10 recommendations.” (*Id.* at 52:17-22, 82:16-19); and
 11
- 11 • He spent a significant amount of his time engaged in “marketing” *i.e.*, “promoting
 12 [his] services” that he could provide to clients through Wells Fargo, and he also
 13 looked for ways to promote other Wells Fargo services, such as meeting the “banking
 14 needs” of the client through “lines of credit, checking, savings …[and] mortgages.”)
 15 (*Id.* at 63:20-64:11, 74:1-17.)

16 As the Ninth Circuit has held, when the employee’s duties substantially “track” duties that the
 17 DOL has deemed exempt under section 541.203, “that says it all,” and the employee is exempt as
 18 a matter of law. *In re Farmers Ins. Exch., Claims Representatives’ Overtime Pay Litig.*, 481 F.3d
 19 1119, 1124, 1129 (9th Cir. 2006) (finding insurance claim adjustors exempt under another
 20 subdivision of section 541.203 and holding that an employee need not perform all of the tasks
 21 listed in the section to be exempt under it).

22 Because Plaintiff Tsyn cannot dispute the fact that he performed the tasks specified as
 23 exempt in section 541.203(b), he instead urges an improper legal construction of the regulation.
 24 Plaintiff effectively contends that because he received transaction-based incentive compensation
 25 and because he was evaluated at least in part on the amount of revenue he generated, all of the
 26 various tasks he performed “funneled” into a transaction, and so all of his tasks fall under the
 27 rubric of sales thereby rendering him non-exempt under the final sentence of section 541.203(b).
 28

27 ¹ “Tsyn Dep.” refers to Plaintiff Tsyn’s deposition transcript, the cited portions of which are
 28 attached as Exhibit A to the Declaration of Malcolm Heinicke (“Heinicke Decl.”) filed
 concurrently herewith.

1 This effort fails at multiple levels. *First*, the 2004 regulations, and section 541.203(b) in
 2 particular, were clarifying regulations that did not alter the decades of direct regulatory guidance
 3 stating that registered FAs like Plaintiff are properly classified as exempt. *Second*, Plaintiff's
 4 labelling argument proves too much—most if not almost all financial service employees have
 5 customers who eventually place transactions that yield revenue, but when adopting the 2004
 6 regulations, the DOL made clear that “many financial services employees qualify as exempt
 7 administrative employees, even if they are involved in some selling to consumers.” 69 Fed. Reg.
 8 22,122, 22,146 (Apr. 23, 2004).

9 *Third*, Plaintiff's urged construction contravenes section 541.203(b) itself. The regulation
 10 is dichotomous—if the employees perform the exempt tasks, then they are exempt, but if not, then
 11 they are not exempt if they primarily engage in sales. The reading Plaintiff urges would
 12 improperly render all but the last sentence of the regulation surplusage. In response to an earlier
 13 wave of litigation in which plaintiffs asserted the same “sales” argument, the DOL issued an
 14 Opinion Letter squarely concluding that licensed FAs generally meet the administrative
 15 exemption. In doing so, the DOL made clear that if an employee performs some or all of various
 16 tasks listed as exempt in section 541.203(b) (*i.e.*, gathering client information and making suitable
 17 recommendations), then that employee is necessarily **not** engaged in mere, non-exempt sales
 18 work. *See* Opinion Letter Fair Labor Standards Act (FLSA), 2006 WL 3832994, at *1, *5 (Nov.
 19 27, 2006) (“2006 DOL Opinion Letter”) (the “description of the duties of these registered
 20 representatives suggests that they have a primary duty other than sales, ***because*** their work
 21 includes collecting and analyzing a client’s financial information, advising the client about the
 22 risks and the advantages and disadvantages of various investment opportunities . . . and
 23 recommending to the client only those securities that are suitable for the client’s particular
 24 financial status, objectives, risk tolerance, tax exposure, and other investment needs”) (emphasis
 25 added); *see also Auer v. Robbins*, 519 U.S. 452, 459-61 (1997) (reiterating the deference given to
 26 DOL Opinion Letters and noting that they are controlling unless “plainly erroneous or inconsistent
 27 with the regulation”); *In re Farmers*, 481 F.3d at 1129 (same). A court confronting the same issue
 28 has similarly concluded that an FA who worked at branch and grocery store outlets and spent half

1 of his time cold-calling was exempt as a matter of law because, even though he characterized his
 2 various tasks as sales-related, he performed the exempt tasks listed in the regulation. *See Hein v.*
 3 *PNC Fin. Servs. Group, Inc.*, 511 F. Supp. 2d 563 (E.D. Pa. 2007) (granting summary judgment
 4 and then denying the pending conditional certification motion as moot).

5 For these reasons, WFA respectfully requests that this Court grant its Motion for Partial
 6 Summary Judgment on Plaintiff Tsyn's Second Cause of Action, *i.e.*, his individual FLSA claim.

7 **II. RELEVANT PROCEDURAL HISTORY**

8 Plaintiff filed this action on March 28, 2014, alleging, *inter alia*, that he and WFA FAs
 9 throughout the nation are misclassified as exempt employees in violation of the FLSA.

10 On September 24, 2015 Plaintiff moved for conditional certification of a national class of
 11 FAs in WFA's Wealth Brokerage Services ("WBS") business line, and through a separate
 12 pleading, WFA has strenuously opposed such certification (*see* ECF No. 68). After the deadline
 13 to amend the complaint had passed, Plaintiff sought leave to file a Third Amended Complaint
 14 ("TAC"). Wells Fargo did not oppose this motion, and Plaintiff filed the TAC on October 21,
 15 2015. The TAC adds three new plaintiffs, including one WBS FA, Catherine Horan-Walker.
 16 Plaintiff Horan-Walker has not sought conditional certification of her FLSA claims. Wells Fargo
 17 reserves the right to seek summary judgment with respect to her individual FLSA claim.

18 **III. UNDISPUTED FACTS**

19 Plaintiff's own deposition testimony provides the key, undisputed facts:

20 **A. Plaintiff Worked for WFA as a Licensed, Financial Services Professional**

21 Plaintiff Tsyn is a former FA in the WBS division where he was required to be a
 22 "registered representative" with the Financial Industry Regulatory Authority ("FINRA").²
 23 Plaintiff was employed by WFA as an FA for approximately four years, from 2008 until his
 24 resignation in December 2012. (Tsyn Dep. at 22:15-25.) At the time of his hire, Plaintiff had over

25 ² A "registered representative" is an individual who is registered with FINRA (formerly known
 26 as the National Association of Securities Dealers ("NASD")) and has passed the Series 7 and
 27 Series 63 licensing examinations. (Tsyn Dep. at 17:24-18:2; Heinicke Decl. ¶ 2, Ex. B (Egan
 28 Deposition Transcript) at 32:21-33:4.) SEC/FINRA rules require an individual to possess those
 licenses to trade any security. *See* FINRA Rule 1031. Topics covered on those exams include
 various securities, regulations, and ethics. (Tsyn Dep. at 35:23-36:4.)

1 ten years of experience as a registered representative, working in “similar” roles at others firms.
 2 (*Id.* at 17:9-22:16, 197:14-22, 194:15-195:1.) Plaintiff is a college graduate with numerous
 3 professional licenses, specifically, the Series 7, 63, 65, and an insurance license. (*Id.* at 16:23-
 4 17:1, 23:5-13, 28:10-12; Heinicke Decl. ¶ 1, Ex. A at Dep. Ex. 1 (job application).) Plaintiff now
 5 works as a registered representative at Fidelity Investments, and he has described himself in
 6 another pending lawsuit as a “very savvy financial advisor.” (Tsyn Dep. at 200:15-24, 203:14-17;
 7 Heinicke Decl. ¶ 1, Ex. A at Dep. Ex. 16.)

8 Plaintiff received a guaranteed draw/salary in a gross amount well above the pertinent
 9 FLSA \$455 weekly minimum for exempt employees, and he was also eligible for significant
 10 additional incentive compensation under the applicable compensation plan. (Tsyn Dep. at 148:9-
 11 12, 201:24-202:3; Heinicke Decl. ¶ 1, Ex. A at Dep. Ex. 15.) Plaintiff estimates that ten to fifteen
 12 percent of his business consisted of “wrap” accounts, which are fee-based accounts where he was
 13 compensated based on a percentage of the total assets under management (not on a transaction-by-
 14 transaction basis). (Tsyn Dep. at 86:6-87:4.) Consistent with industry practice, WFA classified
 15 Plaintiff as an exempt employee who was not eligible for premium overtime pay. Plaintiff admits
 16 that none of the seven firms he has worked for as a registered representative since 1997 has ever
 17 treated him as non-exempt or paid him premium overtime. (*Id.* at 192:23-193:2, 193:4-194:13,
 18 195:10-196:1, 197:2-6.)

19 At WFA, Plaintiff had approximately 500 client accounts all of which came to him through
 20 internal Wells Fargo sources, *i.e.*, he did not “cold-call” them. (*Id.* at 63:12-15; 87:8-15; 106:17-
 21 23; 183:2-9.) Approximately 30 to 40 of his clients had investable assets in excess of \$250,000.
 22 (*Id.* at 87:16-88:3.)

23 **B. Plaintiff’s Specific Job Duties**

24 At the end of Plaintiff’s deposition, Plaintiff’s counsel asked leading questions prompting
 25 Plaintiff to characterize his FA positions at WFA and six other brokerage firms as “sales” jobs:

26 BY MR. WYNNE: Q. Mr. Tsyn, is the financial advisor job at WFA a sales
 27 position?

28 MR. SANCHEZ: Objection. Leading.

THE WITNESS: Yes.

1 BY MR. WYNNE: Q. Is there anything that you did at Wells Fargo that is not
 2 somehow related to your sales efforts?

3 MR. SANCHEZ: Objection. Leading and form of the question.

4 THE WITNESS: Everything revolved around sales.

5 BY MR. WYNNE: Q. The financial advisor jobs that you had at previous
 6 broker-dealers, were those also sales positions?

7 A. Yes.

8 (Tsyn Dep. at 204:13-205:4.)³ When questioned why he characterized his job as “selling,”
 9 Plaintiff explained “I view my job as selling, yes, because that is how I get compensated.” (*Id.* at
 10 47:15-18.) Regardless of how he was compensated, his own testimony makes clear that he
 11 performed the duties required of him under pertinent securities rules and also the very tasks that
 12 the DOL has deemed exempt.

13 Critically, Plaintiff clarified that when he used the term “sales,” he was referring to all
 14 tasks that ultimately “funneled into the sale,” and these tasks included “getting to know the client,
 15 making suitable recommendations, designing plans for them long and short term, [and] managing
 16 their portfolio.” (*Id.* at 210:2-9.) Plaintiff further clarified that when he characterized his job as
 17 one of “selling products,” that description was “synonymous” with “designing short-term and
 18 long-term investment plans or strategies.” (*Id.* at 54:15-25.) And, Plaintiff conceded that,
 19 consistent with his own resume describing his position at WFA, his “primary role” at WFA was to
 20 “design and maintain comprehensive wealth plans to address estate, retirement income, and
 21 business succession needs.” (*Id.* at 101:15-20, 103:20-103:24.) Further confirming that the job he
 22 labelled as “sales” actually consisted of exempt tasks, Plaintiff admitted that:

- 23 • He has in the past described his primary tasks or duties at WFA as “managing
 24 portfolios” and this primary task entailed “a process where I would get to know the
 25 client, I would present them with investment products, and as things changed for
 26 my client’s needs I would give them more recommendations on the investment
 27 products.” (*Id.* at 40:10-21.)
- He has described his business to clients as “wealth management.” (*Id.* at 72:20-
 28 22). In his words, this meant “[u]nderstanding their financial needs, offering them

³ Although WFA addresses this testimony on its merits in this Motion, WFA asserts that this testimony was obtained improperly through leading questions and accordingly objects to its use.

appropriate financial solutions, and updating those financial solutions as their needs evolve.” (*Id.* at 72:23-73:2.)

- As a WFA FA, his task was to understand [his] client, and [his] job as a financial consultant was to match an appropriate investment product to their *specific* needs.” (Tsyn Dep. at 42:14-17 (emphasis added)). This entailed understanding his client’s objectives by gathering various pieces of information about his client’s circumstances and goals. (*Id.* at 42:14-44:14.)
- Plaintiff’s role when prospective clients were referred to him was “to provide them with financial advice on how [Plaintiff] could meet their needs with certain financial products.” (*Id.* at 60:6-12.)
- A business plan that he drafted while at WFA was truthful when it stated: “My business is wealth management. I design short and long-term investment plans that satisfy my [clients’] needs to fight inflation, protect assets, and transfer funds to loved ones as painlessly as possible.” (*Id.* at 76:7-77:13, 81:11-18; Heinicke Decl. ¶ 1, Ex. A at Dep. Ex. 3.)
- Plaintiff’s employment application accurately described his major responsibilities in his previous roles as a registered representative—roles, which he testifies were “similar” to his work at WFA—as “manag[ing] financial portfolios”—and nowhere in his application did he describe those prior responsibilities as “selling.” (Tsyn Dep. at 75:21-76:6; Heinicke Decl. ¶ 1, Ex. A at Dep. Ex. 1.)
- He never told any of his clients that he viewed his primary role or primary duty to be selling them financial products. (Tsyn Dep. at 212:1-5.)

Plaintiff’s testimony regarding the life cycle of investment advice aptly summarizes his work: After obtaining an internal referral, Plaintiff would make contact with the client and gather financial information per the Know Your Customer Rule. (*Id.* at 94:13-95:1.) This process entailed gathering the clients’ financial records and discussing their financial documents with them. (*Id.* at 95:6-16.) From there, he would start to examine what potential investment options there were to meet each client’s needs. (*Id.* at 95:22-96:6.) He would then recommend products “that seemed most suitable.” (*Id.* at 96:17-21.) The client would be offered “an array of investments that might meet a need,” as well as, “the benefits and features along with the risks would be discussed.” (*Id.* at 96:22-97:3.) The next step was obtaining an agreement with the client as to which recommendation the client wanted to accept. (*Id.* at 97:8-11.)

Plaintiff’s involvement with the client did not end with a single transaction. (*Id.* at 97:12-14.) Rather, he would continue monitoring the performance of the portfolio and the individual

1 investments in it as well as market or financial news. (*Id.* at 97:15-98:4.) This was an ongoing
 2 process, in which Plaintiff maintained communication with the client to inform them about their
 3 investments and determine if the investments still met their needs or if those needs had changed.
 4 (*Id.* 98:5-16.) If performance was not satisfactory or the client's needs had changed, Plaintiff
 5 would go through the process of making new recommendations. (*Id.* at 98:17-22.)

6 Focusing on the specific exempt tasks set forth in 29 C.F.R. § 541.203(b), Plaintiff admits
 7 that as a WBS FA, he collected and analyzed information regarding his client's income, assets,
 8 investments or debts; determined which financial products best met the client's needs and
 9 financial circumstances; advised his clients regarding the advantages and disadvantages of
 10 different financial products; and engaged in marketing and promotional activities.

11 **1. Plaintiff Collected and Analyzed His Clients' Financial Information**

12 Plaintiff admits that, as a registered representative, he was required to and did in fact
 13 follow FINRA's "Know Your Customer" and "Suitability" Rules, which were created by
 14 regulation to protect the investing public. (*See id.* at 29:7-10, 36:23-38:6, 39:20-23, 41:10-22;
 15 45:4-10; Heinicke Decl. ¶ 1, Ex. A at Dep. Ex. 2); *see also* FINRA Rule 2090 ("Every member
 16 shall use reasonable diligence, in regard to the opening and maintenance of every account, to
 17 know (and retain) the essential facts concerning every customer and concerning the authority of
 18 each person acting on behalf of such customer"); FINRA Rule 2111 (requiring, in part, that a
 19 broker-dealer "have a reasonable basis to believe that a recommended transaction or investment
 20 strategy involving a security or securities is suitable for the customer, based on the information
 21 obtained through the [profiling process].")

22 As Plaintiff explains, the Know Your Customer Rule "means understanding the client's
 23 financial needs, their experience with investing, their basic knowledge, their financial net worth."
 24 (*Tsyn Dep.* at 38:2-6.) In fulfilling his obligations under this rule, Plaintiff admits that he would
 25 gather information about each client's income, assets, current investments, debts, risk tolerance,
 26 investment objectives, and personal needs (e.g., whether they needed a certain level of liquidity or
 27 when they were going to retire). (*Id.* at 38:7-39:10.)

28

1 As Plaintiff further admits, FINRA's Suitability Rule also necessitated that he gather
 2 information about each client's financial situation because it requires the FA to have a reasonable
 3 basis to believe that an investment strategy involving securities is suitable for that client based on
 4 reasonable diligence of the customer's profile. (*Id.* at 41:10-22, 42:14-43:1, 44:20-45:10.) When
 5 determining whether an investment was suitable, Plaintiff would want to know his customers'
 6 "entire financial picture," including, among other items, their tax status, cash flow, and their
 7 investment experience, objectives, and time horizons. (*Id.* at 42:18-44:14.)

8 Plaintiff began gathering this financial information upon starting a client relationship. (*Id.*
 9 at 65:12-19, 94:21-95:1.) This was not a one-time process; instead, Plaintiff remained
 10 knowledgeable about each client and monitored his client's investment objectives for change. (*Id.*
 11 at 41:1-9.) Accordingly, he would reach out to clients regularly (at least annually and for certain
 12 clients quarterly) to determine if the investment portfolio in which he had placed them in was still
 13 meeting their needs. (*Id.* at 78:4-25, 98:5-99:4.)

14 **2. Plaintiff Determined Which Investments Best Suited His Clients**

15 As stated on the face of the rule, the suitability requirement mandates not only that the FA
 16 gather pertinent financial information, but also that the FA use that information to determine
 17 which investment options are, as the name implies, best "suited" to the client. *See* FINRA Rule
 18 2111. Plaintiff acknowledges that he followed FINRA's Suitability Rule, and that, consistent with
 19 this rule, his "job as a financial consultant was to *match an appropriate investment product to*
 20 *their [clients'] specific needs.*" (Tsyn Dep. at 42:14-17 (emphasis added); *see also id.* at 36:23-
 21 37:1, 41:10-22, 77:7-13, 81:11-18, 213:8-10; Heinicke Decl. ¶ 1, Ex. A at Dep. Ex. 3 (business
 22 plan developed by Plaintiff, accurately stated that "I design short and long-term investment plans
 23 *that satisfy my clients' needs . . .*") (emphasis added).)

24 Plaintiff endeavored to recommend investment options "that met that client's needs and
 25 financial circumstances." (Tsyn Dep. at 56:1-5.) When making his recommendations, Plaintiff
 26 would consider the client information that he collected. (*Id.* at 48:25-49:4.) When making his
 27 recommendation, Plaintiff would "compare and evaluate" competing products so that he could
 28 make a "suitable recommendation" to the client. (*Id.* at 50:5-9.) His client advice process was, as

1 he put it, “[t]o understand the client’s needs.” (*Id.* at 77:22-23.) Plaintiff concedes that his
 2 recommendations were not “a standard product or a standard strategy”, but rather “customized to
 3 [the customers’] particular needs as [he] analyzed them.” (*Id.* at 61:3-6.)

4 **3. Plaintiff Advised His Clients on Advantages and Disadvantages**

5 As Plaintiff summarized it, his role with clients was to “provide them with financial advice
 6 on how [Plaintiff] could meet their needs with certain financial products.” (*Id.* at 60:6-12.)
 7 Plaintiff admits that one of his obligations in doing so “was to advise the client on the potential
 8 advantages and disadvantages of each of [his] recommendations.” (*Id.* at 52:17-22.) Plaintiff
 9 explains: “Based on [the client’s] particular risk tolerance, I had to explain that when there was an
 10 investment product offer, what the potential benefits were, what the potential pitfalls were.” (*Id.*
 11 at 52:25-53:3; *see also id.* at 55:4-10 (discussing the positives and negatives of those investments
 12 in this manner is part of clients’ advice), 119:10-120:-25; Heinicke Decl. ¶ 1, Ex. A at Dep. Ex. 8
 13 (for high net worth clients, he also discussed with them the risks of *not* investing).)

14 In his WFA business plan, Plaintiff wrote that an attribute of his “ideal client” is one that
 15 “values my advice.” (*Id.* at 82:9-15; Heinicke Decl. ¶ 1, Ex. A at Dep. Ex. 3.) Moreover,
 16 Plaintiff, who logged some notes of his client interactions, testified that Exhibit 6 to his deposition
 17 reflected a typical client interaction record. (*Id.* at 105:8-10, 113:25-115:5; Heinicke Decl. ¶ 1,
 18 Ex. A at Dep. Ex. 6 (log entry of client meeting, providing in the second paragraph: “Other risks
 19 explained: price & yield can fluctuate, non fdic insured, 12 mo cdsc of 1%. Benefits: competitive
 20 rate and monthly income.”).)

21 **4. Plaintiff Engaged in Marketing, Servicing, and Promotional Work**

22 Plaintiff testified that marketing (meaning “promoting [his] services”) comprised a
 23 significant portion of his time as an FA. (Tsyn Dep. at 74:1-14.) Additionally, his 2010 goals, as
 24 set forth in his business plan, include “marketing,” which meant “continu[ing] to focus on
 25 productive referral sources.” (*Id.* 80:7-14; Heinicke Decl. ¶ 1, Ex. A at Dep. Ex. 3.) Plaintiff not
 26 only promoted the services he could provide at Wells Fargo to potential and existing clients, but
 27 he also advised and trained bankers on what to look for in identifying potential referrals to
 28 Plaintiff’s brokerage services. (Tsyn Dep. at 66:9-67:12, 112:21-113:1). Plaintiff also reviewed

1 his clients' financial information to identify whether they had any needs that could be met via a
 2 referral to the banking side of the business (*e.g.*, for lines of credit, checking, savings, and
 3 mortgages). (Tsyn Dep. at 63:20-64:11.)

4 **C. Temporal Allocation of Plaintiff's Time**

5 Plaintiff testified that, as a WBS FA, he spent his time approximately as follows:

- 6 • Forty percent marketing, which means promoting his services, (*id.* at 74:1-17);
- 7 • Twenty percent designing short and long-term investment plans, (*id.* at 73:3-25);
- 8 • Twenty percent meeting with clients, (*id.* at 75:4-6);
- 9 • Under five percent staying current on economic events, (*id.* at 75:1-3);
- 10 • Ten percent completing required paperwork in conjunction with implementing the
 transactions in connection with the investment options to which his clients agreed,
 (*id.* at 74:18-25). Notably, Plaintiff indicated he had an assistant to whom he
 delegated certain tasks (*id.* at 164:20-24)); and,
- 11 • Five percent data input, Envision, Morningstar, and preparing for client meetings.
 (*Id.* at 75:8-13.)⁴

12 **D. Plaintiff Had Considerable Discretion and Independence in His Job**

13 Although he worked out of two different offices, Plaintiff had no manager in either of
 14 those locations. (*Id.* at 122:11-16.) His supervisor from 2008 until early 2010 (Josh Smith) was
 15 located in a different city, and his supervisor during the pertinent period here (Dan Hilken) had an
 16 office in a different building. (*Id.* at 61:7-62:17.) Plaintiff spoke with Mr. Hilken on a weekly
 17 basis and met in person with him only once per month. (*Id.* at 121:17-20, 122:17-19.) The
 18 discussions at these monthly meetings were "about growing [Plaintiff's] business" and not about
 19 instructions concerning Plaintiff's investment advice. (*Id.* at 137:14-138:7.) Plaintiff admits that:

- 20 • He did not send the information he gathered on his clients to Mr. Hilken for review,
 (*id.* at 123:19-23);
- 21 • A supervisor was not present when Plaintiff met with clients to update them on the
 performance of their portfolios, and he did not need preapproval to have these

22 ⁴ Envision and Morningstar were software tools that helped Plaintiff determine suitable
 23 investments, although the ultimate investment recommendation was a judgement call made by
 24 Plaintiff based on his analysis and knowledge of the client and the client's financial situation. (*Id.*
 25 at 48:3-49:4, 50:18-51:11, 102:18-19.)

1 discussions, explaining, “I would just pick up the phone and do my job as
 2 outlined,” (Tsyn Dep. at 130:13-20, 131:7-12); and

- 3 • Although he believes that his supervisors had access to all electronic information
 4 on the system, he does not know whether any supervisor ever reviewed a wealth
 5 management plan that he designed for his clients. (*Id.* at 129:9-130:12.)

6 Thousands of investment options (including many not proprietary to Wells Fargo) were
 7 available to Plaintiff to choose from when making recommendations to his clients. (*Id.* at 48:12-
 8 16.) In addition, he also occasionally worked with a product that was not approved and for which
 9 he could seek approval. (*Id.* at 125:8-10.) For example, he needed preapproval to recommend a
 10 market-linked CD, but that was because the asset is highly illiquid, and the FAs had been
 11 “rigorous[ly]” trained “to understand the risks so [that] we could explain those risks to [the] clients
 12 and so that we could identify the appropriate clients for these investments.” (*Id.* at 133:13-134:1.)
 13 Although he would receive pushback from WFA “if something smelled fishy with an investment
 14 recommendation,” this occurred only “[m]aybe a handful of times.” (*Id.* at 131:23-132:9.)

15 When questioned about compliance issues, Plaintiff testified that he very frequently “toed
 16 the line” in trying to comply with “the stringent rules.” (*Id.* at 132:12-21.) Plaintiff conceded that,
 17 as a registered representative, he had to follow the rules of regulatory bodies, regardless of who his
 18 employer was, and that such rules exist for the protection of the investing public and to prevent
 19 illegal activity by registered representatives. (*Id.* at 37:2-38:1.) He admits that he was never
 20 placed on heightened supervision (*i.e.*, where someone is having compliance issues repeatedly and
 21 the firm places “narrower bumpers” on what that person can and cannot do). (*Id.* at 138:8-139:1.)

22 **IV. ARGUMENT**

23 A district court must grant a motion for summary judgment if the movant shows that there
 24 is no genuine dispute as to any material fact and the moving party is entitled to judgment as a
 25 matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48
 26 (1986). The instant motion is based on Plaintiff’s own deposition testimony, and so there is no
 27 factual dispute concerning the tasks he performed. Instead, the only issue is a question of law, *i.e.*,
 28 the proper interpretation and application of the administrative exemption to these undisputed facts.
 Plaintiff cannot as a matter of law escape summary judgment by labeling all that he did as sales

1 simply because the tasks he performed often (though not always) culminated in a transaction for
 2 which he was compensated. The regulations and pertinent DOL guidance make clear that a
 3 licensed Financial Advisors who performs the exempt tasks listed in the pertinent regulations is
 4 exempt even if the tasks he performs usually (though not always) culminate in a transaction or
 5 sale. This is especially true here because Plaintiff admits that he spent only a small minority of his
 6 time actually effectuating transactions.

7 **A. The Administrative Exemption as Applied to Financial Advisors**

8 **1. DOL Regulations Have Long Stated that FAs Satisfy the Duties Test**

9 To establish the administrative exemption, an employer need only show that a salaried
 10 employee's primary duty (a) was the "performance of office or non-manual work directly related
 11 to the management or general business operations of the employer or the employer's customers";
 12 and (b) "include[d] the exercise of discretion and independent judgment with respect to matters of
 13 significance." *See 29 CFR § 541.200(a)(2), (3).*⁵ "Determination of an employee's primary duty
 14 must be based on all the facts in a particular case, with the major emphasis on the character of the
 15 employee's job as a whole." 29 CFR § 541.700(a).

16 Since the inception of the administrative exception in the 1940s, the DOL regulations have
 17 made clear that customers brokers in brokerage firms (now referred to as registered
 18 representatives) satisfy both duties prongs of the this test. *See 29 C.F.R. § 541.205(c)(5)* (1949)
 19 ("customers' brokers in stock exchange firms" meet the requirement that an administrative
 20 employee perform "non-manual work directly related to the management policies or general

21

22 ⁵ In addition to the "primary duty" test, and like the other "white collar" exemptions, the
 23 administrative exemption requires that the employee be compensated "on a salary or fee basis at a
 24 rate of not less than \$455 per week." 29 CFR § 541.200(a)(1). Plaintiff cannot dispute the fact
 25 that he was paid on a salary basis. (Tsyn Dep. at 139:10-23, 142:20-143:22.) Specifically,
 26 Plaintiff admits he received a guaranteed draw that was paid regardless of eligibility for incentive
 27 compensation. (*Id.*) And, the payment of any additional and variable compensation does not
 28 undermine the FA's salaried status. *See, e.g.,* 2006 DOL Opinion Letter at *7 n.5 (opining that the
 salary basis test was satisfied where FAs were guaranteed at least \$455 per week *plus commission*
once the draw was covered, explaining "[w]hat matters is that the employee receives no less than
 the weekly-required amount as a guaranteed salary constituting all or part of total compensation,
 which amount is not subject to reduction due to the quality or quantity of the work performed.");
Boykin v. Boeing Co., 128 F.3d 1279, 1282 (9th Cir. 1997) (holding that "additional compensation
 besides the salary is not inconsistent with the salary basis of payment").

1 business operations of [his/her] employer or [his/her] employer’s customers”); 29 C.F.R. §
 2 541.207(d)(2) (1949) (the exercise of discretion and independent judgment with respect to matters
 3 of significance “includes the kind of discretion and independent judgment exercised by a
 4 customer’s man in a brokerage house in deciding what recommendations to make to a customer
 5 for the purchase of securities”).⁶ Subsequent iterations of the Administrative Exemption
 6 Regulation are consistent. *See e.g.*, 29.C.F.R. § 541.205(c)(5) (1973); 29 C.F.R. § 541.207(d)(2)
 7 (1973). Notably, federal regulations outlining both prongs of the test caution that it is impossible
 8 to list all exempt positions and yet, among the few examples provided, the DOL specifies that
 9 financial consultants and customer representatives in financial firms satisfy each test. *See id.*
 10 §§ 541.201(a)(3); 205(c)(5); 205(d); 541.207(d)(2) (1973).

11 The 2004 clarifying regulations confirm that financial services employees “generally meet
 12 the duties requirements for the administrative exemption” if their duties “include”:

13 collecting and analyzing information regarding the customer’s income, assets,
 14 investments or debts; determining which financial products best meet the
 15 customer’s needs and financial circumstances; advising the customer regarding
 16 the advantages and disadvantages of different financial products; and marketing,
 17 servicing or promoting the employer’s financial products. However, an employee
 18 whose primary duty is selling financial products does not qualify for the
 19 administrative exemption.

20 29 C.F.R. § 541.203(b). Section 541.203(b) does not require that employees primarily perform
 21 these exempt tasks. When promulgating this regulation, the DOL stated that “many financial
 22 services employees qualify as exempt administrative employees, *even if they are involved in some*
 23 *selling to consumers.*” 69 Fed. Reg. 22,122, 22,146 (Apr. 23, 2004) (emphasis added).

24 Leaving essentially no doubt on the topic, the DOL responded to earlier lawsuits making
 25 the same argument Plaintiff asserts here by issuing the 2006 Opinion Letter concluding that
 26 registered representatives, *i.e.*, financial representatives who are licensed with NASD/FINRA,
 27
 28

29 ⁶ There can be no question that the DOL was applying the exemption to the employees that we
 30 now refer to as registered financial advisors or registered representatives. *See* 70 Fed. Reg. 20,
 31 424, 20,428 (Apr. 19, 2005) (citing contemporaneous documents and demonstrating that a
 32 “customer’s man” in a brokerage firm was the predecessor term used to describe a “registered
 33 representative”).

1 generally satisfy the administrative exemption. *See* 2006 DOL Opinion Letter at *1. The DOL
 2 concluded that the administrative exemption covered the subject FAs because they:

3 [1] “service their employer’s financial services business by engaging in promotion
 4 and business development activities, including the marketing, servicing, and
 5 promoting of the employing firm’s financial services and products, and by making
 6 themselves visible to the appropriate segments of the public in order to meet and
 7 retain potential new clients for their employing firm” [and (2) exercise discretion
 8 and independent judgment with respect to matters of significance in that they]
 9 “assess the client’s investment objectives, investment experience, and tolerance for
 10 risk—significant factors in determining the investment advice the registered
 11 representative will provide to the client based on the client’s particular
 12 circumstances—and then compare and evaluate possible investment options and
 13 render advice only after all the various possibilities have been considered.”

14 2006 DOL Opinion Letter at *5-6. The DOL emphasized that the exemption applies even though
 15 “[a]s an incident to providing their clients with investment advice, registered representatives *also*
 16 *bring about the purchase or sale of such investments for their clients and execute the actual*
 17 *transactions that result from their financial advice*”. *Id.* at *2 (emphasis added). Federal law
 18 requires courts to give deference to DOL Opinion Letters interpreting its own regulations. *Auer*,
 19 519 U.S. at 459-61 (DOL Opinion Letters are controlling unless “plainly erroneous or inconsistent
 20 with the regulation”); *In re Farmers*, 481 F.3d at 1129 (same).

21 In short, decades of DOL regulatory guidance has made clear that performing the tasks
 22 deemed exempt in section 541.203(b) qualifies an FA for the exemption, even though the
 23 performance of these tasks culminates in or otherwise relates to a transaction or sale.

2. The DOL Has Not Challenged Industry-Wide Classification Practice

24 WFA is unaware of any major brokerage firm to have reclassified its FAs as hourly
 25 employees. Plaintiff’s experience is consistent. (Tsyn Dep. at 192:23-193:23, 194:15-196:1,
 26 196:19-197:6 (attesting that none of the *seven* different financial services firms he has worked for
 27 since entering the industry as a registered representative in 1997 has paid him on an hourly basis
 28 with premium overtime, including his present employer, Fidelity Investments).)

29 The DOL has never initiated any action against the major brokerage firms concerning their
 30 widespread and well-known practice of classifying FAs as exempt. The Supreme Court has made
 31 clear that such DOL inaction is telling. *See, e.g., Christopher v. SmithKline Beecham Corp.*, 132
 32 S. Ct. 2156, 2168 (2012) (rejecting the DOL’s newfound determination that a class of

1 pharmaceutical employees was not exempt and holding that “where, as here, an agency’s
 2 announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction,
 3 the potential for unfair surprise is acute . . . while it may be ‘possible for an entire industry to be in
 4 violation of the [FLSA] for a long time without the Labor Department noticing,’ the ‘more
 5 plausible hypothesis’ is that the Department did not think the industry’s practice was unlawful.”)
 6 (quoting *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510–511 (2007)). Here, of course, the
 7 DOL has not reversed course and has instead confirmed its decades of regulatory guidance and
 8 non-enforcement with an Opinion Letter stating that licensed financial advisors are exempt.

9 **B. Plaintiff is Exempt Because His Duties Track Those in § 541.203(b)**

10 Section 541.203(b) identifies four job functions that will generally qualify a financial
 11 services employee for the administrative exemption: (1) collecting and analyzing customer
 12 financial information; (2) determining which products best meet the customer’s needs, (3)
 13 advising on the advantages and disadvantages of different products, and (4) marketing, servicing,
 14 or promoting the employer’s financial products. *See* 29 C.F.R. § 541.203(b). Plaintiff admits he
 15 performed all of these functions. Plaintiff admits that he was bound by and did in fact follow
 16 FINRA’s “Know Your Customer” and “Suitability” Rules, which required him to collect detailed
 17 information about each of his customer’s financial circumstances and particular needs and, based
 18 upon his analysis of that information, determine which financial products best suited the
 19 customer’s specific needs. He admits that he advised clients “on the potential advantages and
 20 disadvantages of each of [his] recommendations.” (Tsyn Dep. at 52:17-22.) Plaintiff admits he
 21 engaged in marketing, which he states means promoting his services. (*Id.* at 74:15-17.) He also
 22 trained bankers on how to recognize potential candidates for WFA’s brokerage services, and he
 23 identified potential referrals of brokerage clients to WFA’s banking business. (*Id.* at 66:9-67:12,
 24 112:21-113:1.) Plaintiff has aptly summarized his role as follows: “my task was to understand
 25 my client, and my job as [an FA] was to match an appropriate investment product to their *specific*
 26 needs.” (*Id.* at 42:14-17 (emphasis added).)

27 The Ninth Circuit has held that when the employee’s duties substantially “track” duties
 28 that the DOL has deemed exempt in section 541.203, “that says it all,” and the employee is

1 exempt as a matter of law. *In re Farmers*, 481 F.3d at 1124, 1129 (holding claims adjusters
 2 satisfied both prongs of the administrative exemption where they were “required to do virtually all
 3 of the very things that § 541.203 contemplates,” and noting that “[t]he regulation, however, does
 4 not require the adjuster to perform each and every activity listed”). Here, because Plaintiff’s
 5 admitted job functions mirror each of the exempt duties delineated in section 541.203(b), he was
 6 exempt as a matter of law under both prongs of the primary duty test. Having admitted that he
 7 performed these exempt tasks, Plaintiff may argue that he can nevertheless escape summary
 8 judgment by labeling his primary duty as sales and then cloaking his claim in the one-sentence
 9 exception at the end section 541.203(b). This effort fails as a matter of law at several levels.

10 ***First***, Plaintiff cannot establish that the 2004 regulations, or the salesperson exception in
 11 section 541.203(b) in particular, somehow silently reversed decades of regulatory guidance and
 12 standard industry practice. As the Ninth Circuit has held, the 2004 regulations and section
 13 541.203 were merely clarifying regulations, and they therefore did not alter the decades of direct
 14 regulatory guidance stating that registered financial advisors like Plaintiff are properly classified
 15 as exempt. *See In re Farmers*, 481 F.3d at 1128 (holding that the 2004 regulation revisions did
 16 “not represent a change in the law” and applying the pre-2004 regulations and the 2004 clarifying
 17 regulations together); *see also In re American Family Mut. Ins. Co. Overtime Pay Litig.*, No. 06-
 18 cv-17430, 2007 WL 2936319, at *6, n.2 (D. Colo. Oct. 9, 2007) (citing 69 Fed. Reg. 22193 for the
 19 proposition that the 2004 statement of the test for the exemption is “very similar, if not
 20 functionally identical to the former test” and that the updated regulations “clarify but make no
 21 substantive changes in the primary duty test requirement for the administrative exemption”);
 22 Opinion Letter Fair Labor Standards Act (FLSA), 2005 WL 3308596, at *1 (Aug. 26, 2005)
 23 (“[T]here were no substantive changes in the primary duty test requirements for the administrative
 24 exemption” in the 2004 regulations).

25 ***Second***, Plaintiff’s anticipated argument would prove too much – many if not most
 26 financial services employees have customers who eventually place a transaction that generates
 27 revenue for the employee, and the DOL has made clear that “many financial services employees
 28 qualify as exempt administrative employees, even if they are involved in some selling to

1 consumers.” 69 Fed. Reg. 22,122, 22,146 (Apr. 23, 2004). When issuing the 2004 regulations,
 2 the DOL specifically embraced precedent holding that insurance agents satisfy the administrative
 3 exemption. *See* 69 Fed. Reg. at 22145-46 (validating *Hogan v. Allstate Ins. Co.*, 361 F.3d 621
 4 (11th Cir. 2004) (neighborhood insurance agents held exempt even though their primary duty was
 5 to “promote and sell” policies directly to clients); *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1
 6 (1st Cir. 1997) (insurance marketing representatives held exempt), *Wilshin v. Allstate Ins. Co.*, 212
 7 F. Supp. 2d 1360 (M.D. Ga. 2002) (insurance agent who “sold” insurance products and provided
 8 customer service held exempt)). If claims adjustors and insurance agents qualify for exempt
 9 treatment, then it is hard to imagine how highly compensated and licensed financial advisors who
 10 are required to perform the very tasks listed in the regulations do not.

11 ***Third***, the DOL has highlighted the dichotomous nature of section 541.203(b) and made
 12 clear that if an employee performs the tasks listed there as exempt, then that employee necessarily
 13 is ***not*** primarily engaged in non-exempt sales. In other words, because such an employee performs
 14 those exempt tasks, the employee is exempt regardless of whether their tasks “bring about the
 15 purchase or sale of such investments.” Specifically, the DOL opined:

16 [The] description of the duties of these registered representatives suggests that
 17 ***they have a primary duty other than sales, because*** their work includes collecting
 18 and analyzing a client’s financial information, advising the client about the risks
 19 and the advantages and disadvantages of various investment opportunities in light
 of the client’s individual financial circumstances, and recommending to the client
 only those securities that are suitable for the client’s particular financial status,
 objectives, risk tolerance, tax exposure, and other investment needs.

20 2006 DOL Opinion Letter at *5 (emphasis added).

21 In *Hein*, the plaintiff was a Series 7 licensed FA who worked at three branch facilities and
 22 two grocery store outlets during his tenure. *See* 511 F. Supp. 2d at 567. He spent half of his time
 23 “cold calling” potential clients to obtain their business and “was paid a commission on his sales to
 24 [his] clients.” *Id.* at 566, 573. His “sales portfolio” included “sophisticated investment
 25 instruments” from an approved list including non-proprietary products, *i.e.*, “he did not sell
 26 checking or savings accounts, money market accounts, certificates of deposit,” etc. *Id.* at 567.

27 The court granted summary judgment for the employer (mooting the plaintiff’s motion for
 28 conditional certification of a national collective action) for several reasons, each of which apply

1 equally here. First, the evidence suggested that the plaintiff's most important role was to provide
 2 suitable advice to his clients. Here, Plaintiff was required to do so by regulation, and he admitted
 3 that he followed this obligation and that his "primary role" at WFA was to "design and maintain
 4 comprehensive wealth plans to address estate, retirement income, and business succession needs."
 5 (Tsyn Dep. at 101:15-20, 103:11-24; *see also id.* at 42:14-17 ("[M]y task was to understand my
 6 client, and my job as a financial consultant was to match an appropriate investment product to
 7 their specific needs."). Second, the plaintiff in *Hein* was subject to "minimal" supervision because
 8 he saw his manager "no more than twice a month," he communicated with him by phone "eight
 9 times a month" and his manager "did not observe [his] meeting with clients." *Hein*, 511 F. Supp.
 10 2d at 574. Here, of course, Plaintiff admits that he spoke with his manager by phone weekly and
 11 met with him only once a month. (Tsyn Dep. at 121:17-20, 122:17-19.) And, his manager did not
 12 sit in on his client meetings or review his investment advice. (*Id.* at 123:19-23, 130:13-20, 131:7-
 13 12.) Third, the plaintiff in *Hein* made more than the non-exempt assistant with whom he worked,
 14 something that cannot be disputed here. *See Hein*, 511 F. Supp. 2d at 574-75.

15 Most importantly, the *Hein* court rejected the notion that plaintiff could escape summary
 16 judgment by labeling his various functions as non-exempt sales because they all eventually led to
 17 a transaction. *Id.* at 573 (finding that argument "ignores [the] numerous DOL regulations to which
 18 I am required to defer.") The court found that the DOL "has sought to exempt from the FLSA
 19 investment advisors in the financial services industry—*including those engaged in 'sales'*—
 20 provided their sales activities are a function of their professional judgement respecting their
 21 clients' best interests," *i.e.*, by performing the administrative activities listed in section
 22 541.203(b)." *Id.* at 570 (emphasis added). Accordingly, the court found that even the plaintiff's
 23 cold-calling activities were exempt because he would use at least portions of these calls to gather
 24 information about "assets and investment goals." *Id.* at 573. The court held that any "cultivating
 25 and conveying sales activities are exempt," and it held all of the plaintiff's meetings with clients
 26 were exempt in nature because most of the meetings were "spent information-gathering and
 27 decision-making rather than implementing an actual sale or investment." *Id.* In the end, the court
 28 found the plaintiff exempt as a matter of law because he spent only a small amount of time on the

1 non-exempt task of “closing the sale,” *i.e.*, “processing actual transactions [and] filling out
 2 paperwork.” *Hein*, 511 F. Supp. 2d at 573-74; *see also Bachrach v. Chase Inv. Servs. Corp.*, No.
 3 06-2785, 2007 WL 3244186, at *1, *3 (D.N.J. Nov. 1, 2007) (denying Rule 23 class certification
 4 of essentially the same claims and stating that “[w]ith respect to the overtime claims, the law
 5 strongly suggests that [financial advisors] were not entitled to overtime” because “[a]s an example
 6 of administrative employees, federal regulations list ‘[e]mployees in the financial services
 7 industry’ whose duties include collecting information about customers’ finances, preparing a
 8 financial plan for their customers, and ultimately selling the plan. 29 C.F.R. § 541.203 (2007).
 9 This is precisely what the class members [registered financial advisors] do.”).

10 Here, of course, Plaintiff has conceded that he spent the vast majority (approximately 85%)
 11 of his time on tasks that are exempt under the regulations, *i.e.*, attending client meetings (20%),
 12 developing investment plans (20%), marketing (40%) and staying current on economic events
 13 (under 5%). (Tsyn Dep. 73:7-75:13.) He spent only 15% of his time processing actual
 14 transactions and filling out paperwork, specifically 10% of his time “completing required
 15 paperwork” and less than 5% of his time on “data input.” (*Id.* at 74:18-75:13);⁷ 29 C.F.R.
 16 § 541.700(b) (although an employee need not perform over 50 percent of his time on exempt work
 17 to qualify for the exemption, those who do so “generally satisfy the primary duty requirement”).

18 In short, the 2004 regulations confirm what earlier regulations have stated for decades –
 19 licensed financial advisors are exempt under the administrative exemption, and the mere fact their
 20 efforts result in a transaction or sale does not alter this analysis.

21 **C. Plaintiff Cannot Evasion The Clear Application of The Exemption**

22 **1. Plaintiff’s Individual Clients Do Not Preclude His Exempt Status**

23 Although he himself has testified that his “primary role,” was to “design and maintain
 24 comprehensive wealth plans to address estate, retirement income, and *business succession needs*,”
 25 Plaintiff may claim that he did not service any business clients. (Tsyn Dep. at 101:15-20, 103:11-
 26 24) (emphasis added).) From this, Plaintiff may argue that the administrative exemption does not

27 ⁷ Notably, Plaintiff indicated he had an assistant to whom he delegated certain tasks (*id.* at
 28 164:20-24.)

1 apply to any FA who advises only individual clients because the DOL issued guidance in 2010
 2 suggesting that mortgage brokers who provide their company's loans to individuals are not
 3 exempt. *See* DOL Administrator's Interpretation, 2010 WL 1822423, at *9, (Mar. 24, 2010). Not
 4 surprisingly, regulatory guidance actually addressing financial advisors precludes this argument.

5 Although the DOL has consistently stated for decades that licensed FAs are exempt, the
 6 DOL's guidance on *mortgage brokers* has been remarkably inconsistent. In 1999 and in 2001, the
 7 DOL issued letters opining that mortgage-loan officers do not qualify for the administrative
 8 exemption. Following the issuance of the 2004 clarifying regulations, the Mortgage Bankers
 9 Association ("MBA"), a national trade association representing real estate finance companies,
 10 requested a new opinion. In 2006, the Department issued an opinion letter finding that mortgage-
 11 loan officers fell within the administrative exemption under the 2004 regulations. Four years later,
 12 however, in 2010, the Wage and Hour Division again altered its interpretation of the FLSA's
 13 administrative exemption as it applied to mortgage-loan officers through an "Administrator's
 14 Interpretation." Critically, the DOL then withdrew its 2006 opinion letter on mortgage brokers.
 15 *See Perez v. Mortg. Bankers Ass'n*, -- U.S. --, 135 S. Ct. 1199, 1204-05 (2015).

16 The MBA sued claiming that the DOL's actions were procedurally improper, and
 17 ultimately the Supreme Court ruled that the DOL's "Administrator's Interpretation" did not
 18 violate the Administrative Procedures Act, noting that such interpretive rulings "do not have the
 19 force and effect of law and are not accorded that weight in the adjudicatory process." *Id.* at 1204.
 20 The Supreme Court did not address the validity of the Interpretation, but it made clear that the
 21 FLSA does not impose liability when an employer has relied on DOL guidance. *Id.* at 1209.

22 The 2010 "Administrator's Interpretation" concluded that mortgage-loan officers "have a
 23 primary duty of making sales for their employers, and, therefore, do not qualify" for the
 24 administrative exemption.⁸ The Interpretation further asserted that mortgage brokers do not

25
 26⁸ It should be noted that 2010 Interpretation suggested that mortgage brokers were non-exempt
 27 salespersons by applying the "administrative/production dichotomy." The Ninth Circuit in *In re*
Farmers expressly rejected the plaintiffs' production/administrative argument and held that the
 28 claims adjustors there were exempt because they performed the duties listed in section 541.203 as
 exempt. *In re Farmers*, 481 F.3d at 1131-32; *see also Roe-Midgett v. CC Servs., Inc.*, 512 F.3d

1 satisfy the administrative exemption if they service individual customers. Specifically, after
 2 repeating the duties test requirement of “non-manual work is directly related to the management or
 3 general business operations of the employer’s customers,” the Interpretation stated that:

4 work for an employer’s customers does not qualify for the administrative
 5 exemption where the customers are individuals seeking advice for their personal
 6 needs, such as people seeking mortgages for their homes. Individuals acting in a
 7 purely personal capacity do not have “management or general business operations”
 8 within the meaning of this exemption.

9 DOL Administrative Interpretation at *8.

10 Whatever the effect of this “Interpretation” on the exempt status of mortgage brokers is, it
 11 did not purport to change the DOL’s clear guidance on licensed financial advisors. The DOL did
 12 not reverse the decades of actual regulations stating the registered representatives are exempt, and
 13 it did not withdraw its 2006 Opinion Letter squarely stating the same. Again, the administrative
 14 exemption applies if the employee’s work relates to the management or general business
 15 operations “of the employer *or* the employer’s customers.” 29 C.F.R. § 541.200(a)(2) (emphasis
 16 added). The 2006 Opinion Letter makes clear that financial advisors who perform the exempt
 17 tasks listed in section 541.203(b) are exempt regardless of who their clients are because these FAs
 18 perform work directly related to the business operations of their employer, *i.e.*, the brokerage firm:

19 The registered representatives satisfy the duties requirements of the administrative
 20 exemption by performing office or non-manual work directly related to the
 21 **management or general business operations of the employer**, and by performing
 22 duties that include the exercise of discretion and independent judgment with respect
 23 to matters of significance. *See* 29 C.F.R. §§ 541.200(a)(2)-(3); 541.203(b). Similar
 24 to the employees discussed in the 2004 preamble in *John Alden, Hogan, and*
Wilshin -- all of whom were found to satisfy the duties requirements of the
 25 administrative exemption -- **the registered representatives service their**
employer’s financial services business by engaging in promotion and business
 26 development activities, including the marketing, servicing, and promoting of the
 27 employing firm’s financial services and products, and by making themselves
 28 visible to the appropriate segments of the public in order to meet and retain
 potential new clients for their employing firm.

29 2006 DOL Opinion Letter at *5. The identity of the FA’s clients is irrelevant.

30 Once again, the DOL did not withdraw its 2006 Opinion Letter finding FAs exempt. To
 31 the contrary, the DOL’s Administrative Interpretation relied heavily on *Pontius v. Delta Fin.*

32 865, 870-72 (7th Cir. 2008) (concluding that this dichotomy is an antiquated approach that is no
 33 longer helpful in assessing new economy positions in the “modern service industry context”).

1 *Corp.*, 2007 WL 1496692, at *9 and n.20 (W.D. Pa. Mar. 20, 2007) (adopted by *Pontius v. Delta*
 2 *Fin. Corp.*, 2007 WL 1412034, at *1-2 (W.D. Pa. May 10, 2007). In *Pontius*, the court held that
 3 loan officers and mortgage analysts did not qualify for the administrative exemption. In doing so,
 4 however, the *Pontius* court expressly explained why FAs (registered representatives) are
 5 nonetheless exempt, as confirmed by the 2006 DOL Opinion Letter covering FAs:

6 the November 27, 2006 Opinion Letter relates to registered stock brokers who must
 7 uniformly pass qualification/licensing examinations on securities laws, economic
 8 and risk theory, portfolio theory/analysis, and taxation. They are typically retained
 9 on the basis of their securities-related education and/or expertise. These employees
 10 primarily provide **individual** investment advice to their firm's clients based on
 complex and fluctuating market conditions, **individual** investment portfolio
 objectives and consequences, tax ramifications, and timing impacts/alternatives.
 Incident to their provision of client investment advice and related portfolio design
 services, these securities brokers execute stock transactions and market/service the
 brokerage firm's products.") (emphasis added).

12 See *id.* at *7 n.13. The DOL's 2010 Interpretation relies on *Pontius* and cites to it with approval.

13 In 2015, the DOL issued a notice of proposed changes to the salary minimum for the white
 14 collar exemptions as well as potential changes to the duties analysis. This notice set out a table
 15 estimating for certain categories of workers the probability of exempt status under section 13(a) of
 16 the FLSA, *i.e.*, the administrative and other white collar exemptions. See 80 Fed. Reg. 38516-01,
 17 Appendix A (July 6, 2015). In Table A-2, the DOL estimated that "Personal Financial
 18 Advisor[s]" have a probability of exempt status of 50 to 90 percent. See *id.* (assigning Code 2).
 19 Obviously, if the 2010 guidance had silently changed the exempt status of FAs serving individual
 20 clients, then the probability for a "Personal Financial Advisor" would be zero.

21 Current DOL publications are consistent. The DOL's published FLSA Overtime Security
 22 Advisor is "is designed to help employees and employers understand the general application of
 23 these [exemption] regulations," and it contains an occupational index that defines a Financial
 24 Advisor as someone who "uses knowledge of investments, tax laws, and insurance to recommend
 25 financial options to **individuals** in accordance with the individual's short-term and long-term goals
 26 (*e.g.*, retirement and estate planning, funding for college, and general investment options)."
 27 <http://webapps.dol.gov/elaws/whd/flsa/overtime/jobs.htm#F> (last visited Nov. 11, 2015) (emphasis
 28 added). That same entry then refers readers to Fact Sheet #17M: Financial Services Industry

1 Employees and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA), which
 2 repeats section 541.203(b) and adds that the application of the administrative exemption “is based
 3 on the duties [the employees] perform, not on the identity of the customer they serve.”
 4 http://www.dol.gov/whd/overtime/fs17m_financial.htm (last visited Nov. 11, 2015).

5 **2. Plaintiff Exercised Discretion by Making Recommendations**

6 In his motion for conditional certification, Plaintiff argues that FAs are admonished that
 7 they do not have “discretion” as to the “timing or price of trades.” From this, Plaintiff argues that
 8 FAs do not exercise *any* kind of discretion. (Pl.’s Mot. at 12.) As set forth in WFA’s Opposition
 9 to that motion, timing and price “discretion” is a term of art in the industry. FINRA has
 10 established rules around “discretionary” and “non-discretionary” accounts. FINRA Rules 2510(b)
 11 and 2020 and NYSE Rule 408(a) prohibit FAs from making or exercising discretionary trading
 12 authority in a customer’s account unless the client has authorized the FA to do so. A client who
 13 chooses to provide an FA with “discretionary” authority has authorized the FA to determine the
 14 price and timing of transactions for a client, *i.e.*, to effectively trade for the client. The discretion
 15 prong of the administrative exemption is not so demanding, and the DOL has long made clear that
 16 FAs exercise sufficient discretion under the exemption by deciding what *recommendations* to give
 17 clients, even if they do not have the authority to trade for them. 29 C.F.R. § 541.207(d)(2) (1949)
 18 (the exercise of discretion and independent judgment with respect to matters of significance
 19 “includes the kind of discretion and independent judgment exercised by a customer’s man in a
 20 brokerage house in deciding what *recommendations* to make to a customer for the purchase of
 21 securities”); 29 C.F.R. § 541.203(b) (confirming that financial services employees are exempt if
 22 they advise customers regarding the advantages and disadvantages of different financial products,
 23 with no mention of price or timing authority); 2006 DOL Opinion Letter at *6 (because advisors
 24 engage in “evaluating the client’s individual financial circumstances and investment needs and
 25 assessing and comparing the alternatives before making *recommendations* for investment options
 26 to the client,” they exercise sufficient independent judgment). The regulations also state: “[t]he
 27 decisions made as a result of the exercise of discretion and independent judgment may consist of
 28 recommendations for action rather than the actual taking of action.” See 29 C.F.R. § 541.202(c).

1 Here, Plaintiff not only admits to performing the tasks in section 541.203(b), but he also
 2 concedes that he “compared and evaluated” competing financial products so that he could make a
 3 “suitable recommendation” to the client. (Tsyn Dep. at 50:5-9.) When making a recommendation
 4 to a client, he was “making a judgment” based on his analysis of the client’s financial situation
 5 and market research. (*Id.* at 51:5-11.)⁹ Plaintiff dealt primarily with sophisticated instruments
 6 (e.g., individual stocks, bonds, exchange-traded funds (“ETFs”), derivatives, annuities, *etc.*). (*Id.*
 7 at 103:1-6; Heinicke Decl. ¶ 1, Ex. A at Dep. Ex. 4 (resume).) He referred clients to bankers for
 8 more basic items (e.g., lines of credit, checking and savings accounts, and mortgages). (*Id.* at
 9 63:20-64:8.) His book of business consisted of over 500 clients, several dozen of whom had
 10 assets over \$250,000, and he met with his clients without any direct supervision. (*Id.* at 87:8-88:3,
 11 130:13-20, 131:7-12.)

12 As the Ninth Circuit explained, “[d]iscretion and independent judgment do not necessarily
 13 imply that the decisions made by the employee have a ‘finality that goes with unlimited authority
 14 and complete absence of review.’” *In re Farmers*, 481 F.3d at 1130 (claims adjustors exercised
 15 independent judgment and discretion despite the fact that supervisory approval was needed before
 16 the employee could deny a claim) (quoting 29 C.F.R. § 541.202(c)).

17 **V. CONCLUSION**

18 For the forgoing reasons, WFA respectfully requests that this Court grant this motion.

19 DATED: November 19, 2015

MUNGER, TOLLES & OLSON LLP

20
 21 By: /s/ Malcolm A. Heinicke
 22 MALCOLM A. HEINICKE
 Attorneys for Defendant

23
 24
 25
 26⁹ The work that Plaintiff describes doing here is the quintessential exercise of requisite
 27 discretion and judgment. *See* 29 C.F.R. § 541.202(a) (“In general, the exercise of discretion and
 28 independent judgment involves the comparison and the evaluation of possible courses of conduct,
 and acting or making a decision after the various possibilities have been considered.”).